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) Pages 1 - 29

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OFFICIAL COURT REPORTER
United States District Court
1 Courthouse Way, Room 7200
Boston, MA 02210
(617) 345-6787

1 A P P E A R A N C E S:

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3 One State Street, Suite 1500, Boston, Massachusetts, 02109,
4 for the Plaintiff.

5 MARC J. RANDAZZA, ESQ. and JAY M. WOLMAN, ESQ.,
6 Randazza Legal Group, PLLC, 4035 S. El Capitan Way,
7 Las Vegas, Nevada, 89147, for the Defendant, Brian Zaiger.
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P R O C E E D I N G S

THE CLERK: Court calls Civil Action 17-10350, Monsarrat v. GOTPER6700, et al. Could counsel please identify themselves for the record.

MR. GOREN: Good morning, your Honor. Richard Goren for the plaintiff.

MR. RANDAZZA: Good morning, your Honor. Marc Randazza for the defense with my co-counsel, Jay Wolman.

THE COURT: Who?

MR. WOLMAN: Wolman.

THE COURT: Wolman, all right.

MR. WOLMAN: Good morning.

THE COURT: It's your motion, gentlemen.

MR. RANDAZZA: Thank you, your Honor. Well, your Honor, you probably recall last time we were together we discussed in brief some of the details at issue here in our motion to dismiss.

THE COURT: You know, I have so many cases, I think I wouldn't assume too much. I have read the basic arguments, and I did read the reply and surreply. So why don't you --

MR. RANDAZZA: Very well, your Honor.

THE COURT: I mean, there are certain things. For example, as I understand it, the picture is not up anymore.

MR. RANDAZZA: At this time it is not, your Honor, but my client does intend to republish it, which is why the fair

1 use determination is so important to them at this time. My
2 client --

3 THE COURT: Why does your client want -- is your
4 client here right now?

5 MR. RANDAZZA: My client is not here, your Honor.

6 THE COURT: Why does he want to republish it? It is
7 implying that this man is a pedophile. I mean, that's pretty
8 grim.

9 MR. RANDAZZA: It may be grim, your Honor. However,
10 this is his reputation. I mean, the guy was arrested for
11 serving alcohol to underage kids.

12 THE COURT: Well, that's different from being a
13 pedophile.

14 MR. RANDAZZA: Well, your Honor, he also has a
15 reputation for that kind of behavior. But regardless, I think
16 it's --

17 THE COURT: Is it up right now?

18 MR. RANDAZZA: It is not up right now, your Honor.

19 THE COURT: All right, so let me just talk about this
20 for a minute. I don't want to go through this whole exercise.
21 There's a decent argument that the case is time barred.

22 MR. RANDAZZA: Yes.

23 THE COURT: And I don't want to go through and write a
24 whole opinion about whether it's time barred, and then have you
25 put it up and have me start all over again.

1 MR. RANDAZZA: Yes, your Honor.

2 THE COURT: That's what I don't want to do because I
3 have precious judicial resources here.

4 MR. RANDAZZA: I understand.

5 THE COURT: And there's a serious issue about whether
6 it's time barred. But then if I do that and then you just put
7 it back up again, then I'm starting all over again, and you're
8 evading judicial review.

9 MR. RANDAZZA: Well, your Honor, this website
10 operates --

11 THE COURT: When are you putting it back up?

12 MR. RANDAZZA: When we get a determination on fair
13 use, your Honor.

14 THE COURT: I'm not going to give you a determination
15 on fair use here. I'm going to focus on two issues. Fair use
16 is a defense. The one issue is whether it's time barred, which
17 there's a serious argument that it is. The second is whether
18 or not this person who is the person who stood by, you know,
19 was the passerby, is -- I may, if I don't decide it on statute
20 of limitations ground, I'll have to address the second one. If
21 I'm only doing it on time grounds, that's all I'm going to do
22 it on. But I don't want to do that only to have you -- I would
23 feel almost as if it was a fraud on the court, shall we say, if
24 the minute I do that you pop up the picture again.

25 MR. RANDAZZA: Well, your Honor, the issue here is

1 that -- there's a couple issues in that analysis. One is that
2 my client is not the author of the page. This works like
3 Wikipedia.

4 THE COURT: Who is your client?

5 MR. RANDAZZA: My client is Brian Zaiger, who is an
6 administrator of the site. So --

7 THE COURT: Well, administrator of the site meaning
8 he -- well, who owns the site? Usually the person who
9 administers it controls it, right?

10 MR. RANDAZZA: Yes, your Honor.

11 THE COURT: I would assume that for purposes of a
12 pleading.

13 MR. RANDAZZA: But, your Honor, for the way that this
14 site works, it's a user-generated-content site. It's like
15 Wikipedia.

16 THE COURT: I see, I see.

17 MR. RANDAZZA: Right, so I can go on to Wikipedia --
18 it actually runs on Wiki software, so I can go onto the site
19 right now and create a page to mock anyone.

20 THE COURT: So that's part of this debate, the extent
21 to which the administrator is liable for defamatory content?

22 MR. RANDAZZA: Well, there is no defamation claim,
23 your Honor, but --

24 THE COURT: No, but, I mean, that's the issue, to what
25 extent was he liable for what someone else posts?

1 MR. RANDAZZA: We could get to that, your Honor.

2 THE COURT: Copyright?

3 MR. RANDAZZA: Yes, your Honor.

4 THE COURT: All right, copyright infringement.

5 MR. RANDAZZA: But I don't think -- you know, there is
6 at least the allegation that we did not comply with the DMCA
7 sufficiently in order to enjoy that safe harbor. There would
8 still be, yes, secondary liability.

9 THE COURT: Well, I haven't even looked at that.

10 MR. RANDAZZA: Right, and we are not -- I don't think
11 if we get that far down the road, your Honor, we've gone past
12 statute of limitations, past authorship, past fair use, and --

13 THE COURT: But I'm not here to do advisory opinions.
14 The way I saw it is, there was a decent argument that at least
15 a John Doe complaint should have been filed within the statute
16 of limitations, and that is all I would rule. It would be
17 annoying if I did that, and then the next day you post it again
18 because that starts a statute of limitations all over again.

19 MR. RANDAZZA: Perhaps, your Honor.

20 THE COURT: Not "perhaps." Yes.

21 MR. RANDAZZA: Well, this is -- look, the site is
22 user-generated.

23 THE COURT: Not "perhaps." Yes, for purposes of
24 statute of limitations. There may be other issues. The answer
25 is "yes."

1 MR. RANDAZZA: Well, then, to answer your question as
2 to why he would do it, one, he has a First Amendment right to
3 do so. So if he has some moral reason he shouldn't do it --

4 THE COURT: Can I just say this: The last time you
5 offered to settle this by taking it down, as I remember, or you
6 said, "There's no need for settlement because we have taken it
7 down." There was something along those lines.

8 MR. RANDAZZA: There was no need for an injunction,
9 your Honor.

10 THE COURT: Oh, yes, for an injunction.

11 MR. RANDAZZA: I raised that he had pled for an
12 injunction.

13 THE COURT: That may be. That may be.

14 MR. RANDAZZA: I raised the issue at our first
15 meeting. He said that there was no reason for an injunction
16 because we had taken it down. I did state at that time that my
17 client, at the very least, had the intent to put it back up,
18 and I wanted to make sure that we weren't hiding the ball on
19 that, even back then.

20 THE COURT: I don't remember that. It's possible.

21 MR. GOREN: Might I interrupt, your Honor?

22 THE COURT: Yes.

23 MR. GOREN: I offered to have a settlement with simply
24 an enforceable mechanism that Mr. Zaiger, who, by the way, is
25 Montakia, the poster -- he is the author, the person who put it

1 up in October, 2011, and, when it came down, put it back up
2 after he owned the website. But when he took it down, when you
3 issued your subpoena to Cloud Fair, his identity was going to
4 be uncovered, he took it down. I came to court and said,
5 "Judge, you know, we should mediate. We're willing to settle,"
6 and Mr. Zaiger's counsel, Mr. Randazza, said, "No settlement
7 without us being paid our legal fees." That's what this is
8 about.

9 THE COURT: Randazza, you said that?

10 MR. GOREN: Yes.

11 MR. RANDAZZA: Yes, your Honor. My client has a right
12 to that. He should be held account- --

13 THE COURT: Well, he didn't really want to settle it.
14 Well, anyway, all right, go ahead.

15 MR. RANDAZZA: No, we didn't enter --

16 THE COURT: Well, anyway, just I'm telling you, I will
17 take it as a related case, and I will immediately jump into
18 injunctive hearing if it goes right back up again because I do
19 think you have a good statute of limitations issue.

20 MR. RANDAZZA: I can't control what my client does --

21 THE COURT: I understand that.

22 MR. RANDAZZA: -- as far as putting it back up, your
23 Honor.

24 THE COURT: I just want you to talk to him.

25 MR. RANDAZZA: I will inform him.

1 THE COURT: It's troubling.

2 MR. RANDAZZA: Well, your Honor, I will inform him
3 that the Court feels that way. I can't control whether he
4 releases it to go back up, whether he puts it back up, whether
5 a third party puts it back up. So this is a Wiki page that
6 is --

7 THE COURT: For purposes, I will be right back here.
8 I will take it as a related case. It will be right back here.

9 MR. RANDAZZA: My client will be so informed, your
10 Honor.

11 THE COURT: Okay.

12 MR. RANDAZZA: I may or may not even --

13 MR. GOREN: Might I interrupt?

14 THE COURT: No, you can't. Let him just do his
15 argument, and then you --

16 MR. RANDAZZA: I may or may not be representing him in
17 that case, your Honor, but I have heard what you've said. I
18 will be sure to communicate that to him in full, your Honor.

19 So given that the statute of limitations issue is so
20 clear to your Honor, I don't feel that I need to waste much of
21 your time on it.

22 THE COURT: Well, the big issue really is that -- it's
23 clearly beyond the statute of limitations in terms of when he
24 learned he was harmed, but his big argument, he didn't discover
25 who did it till late in the game.

1 MR. RANDAZZA: That's an interesting argument, your
2 Honor.

3 THE COURT: Not interesting. That's what his argument
4 is. So your argument in counter to that, as I understand it,
5 was that he should have filed a John Doe complaint as he
6 started this one off with.

7 MR. RANDAZZA: That's precisely what I do in every
8 copyright case where I don't know the name of the infringer,
9 your Honor, and that is what is done. So it doesn't take much
10 to do that, your Honor, to preserve your rights. Sometimes we
11 do that on the last day of the three-year period. So he should
12 have done it from the date that he discovered it or the date he
13 should have discovered it, but we have proof in the record
14 at --

15 THE COURT: It's 2013, right?

16 MR. GOREN: 2012.

17 MR. RANDAZZA: Yes, 2012. At Paragraph 26 of the
18 First Amended Complaint, he alleges discovery at least as early
19 as the 22nd of October in 2012. So I don't see how we get
20 around statute of limitations. Additionally, we do want to
21 talk about authorship.

22 THE COURT: Yes, please do. That's a more complex
23 issue, the authorship. Like, if you -- I get your point, he
24 just grabbed somebody like everybody does when they have a
25 family picture and said, "Here, take the picture." I

1 understand that. And the statute says actually "for hire."

2 MR. RANDAZZA: A work for hire can change authorship,
3 yes, your Honor, but this is of course not a work for hire. So
4 let's say the person that Mr. Monsarrat, if this is how it
5 happened, the person says, "I'd like you to take this
6 photograph." And if I ask Mr. Wolman to do it, he's employed
7 by my law firm. Well, my law firm would own that photograph
8 because it -- well, because he's not a regular photographer,
9 but what I'm saying is, if you're an employee, your work
10 presumptively belongs to your employer. If you're an
11 independent contractor, it presumptively belongs to you. If
12 you're simply a passerby, the person who composes that shot,
13 who takes that picture, who looks through the viewfinder,
14 that's the person who owns the photograph. That's the person
15 who owns the copyright.

16 THE COURT: Is there a case that says precisely that
17 about passersby?

18 MR. RANDAZZA: Not passersby, but there is a case that
19 we cited involving Oprah Winfrey.

20 THE COURT: I did see that.

21 MR. RANDAZZA: Yeah, where she claimed that since --
22 what his argument is, is that when you get your clerks together
23 and you say, "Let's take a picture," and one of these clerks
24 says, "No, no, no, hold on. You come here because you're
25 taller," does he become now the author? That's not how it

1 works.

2 THE COURT: So there are no cases precisely on point?

3 MR. RANDAZZA: Just the *Winfrey* case, which is
4 precisely on point where she tried to make this argument. But,
5 you know, I'm sorry, it's such a bizarre argument that a person
6 who's in the photograph might somehow claim that they are the
7 author. It just has never worked.

8 There was another case that is maybe analogous out of
9 the Ninth Circuit, *Garcia v. Google*, where Ms. Garcia performed
10 in a movie, and then she felt that they misportrayed her; that
11 they told her that it was going to be a movie, like, supportive
12 of Islam, and it turned out that it was the exact opposite, and
13 she was getting death threats because of her performance in the
14 movie; and she claimed that her performance on film was
15 actually a copyrightable work. The Ninth Circuit struck that
16 argument down as well. So anytime that I'm aware that this
17 argument has been raised are those two cases, and it simply has
18 never carried any water.

19 And then it's obvious why not. I mean, imagine a
20 family photo with fifty people.

21 THE COURT: I understand the argument.

22 MR. RANDAZZA: You know, think about the chaos we
23 could create. I mean, it might be fun for copyright lawyers if
24 we were to create such chaos, but I think the simple approach
25 that we've always looked at is, the person behind the

1 viewfinder, that's the author, and their allegations clearly
2 show that.

3 Now, if your Honor has no intent of entertaining the
4 fair use discussion --

5 THE COURT: No, no. It's a defense. And, besides,
6 how can it be fair use to say that someone is a pedophile if
7 it's disputed? I just can't do that. It's a horrible thing
8 you're alleging -- maybe you're right -- but if you're wrong,
9 it's really horrible, and I wouldn't do that on a motion to
10 dismiss basis.

11 MR. RANDAZZA: Well, if you don't want me to discuss
12 it, I --

13 THE COURT: No, I don't.

14 MR. RANDAZZA: Then --

15 THE COURT: So there we are. Thank you.

16 MR. RANDAZZA: There we are, your Honor.

17 THE COURT: So, Mr. Goren, I really have a hard time
18 with why this is timely. I don't know -- you did a John Doe on
19 this complaint. You could have done a John -- I'm not blaming
20 you. Maybe your client came to you late. I don't see how this
21 isn't beyond the three-year statute of limitations, even if you
22 didn't know who the identity of the perpetrator was.

23 MR. GOREN: I did not brief any further beyond
24 *Johnson v. Gordon* to know whether the plaintiff should be
25 charged with hiring a lawyer to tell him he should file a John

1 Doe lawsuit.

2 THE COURT: Wait. Start again. Start again, start
3 again. Your client --

4 MR. GOREN: The First Circuit says the cause of action
5 does not accrue until you know the source of your injury or you
6 have inquiry notice that triggers --

7 THE COURT: You had inquiry notice. You could have
8 done exactly what you did this time around. I gave you a
9 subpoena. You found out who it was. I mean --

10 MR. GOREN: Not so, your Honor. The first time there
11 was a case in 2015 where a District Court judge in the Southern
12 District ordered CloudFair to disclose the identity and also
13 enjoined CloudFair. If the Court were to entertain "should
14 have filed a John Doe lawsuit," I would ask to do a couple
15 pages additionally.

16 THE COURT: No. It's fully briefed. We're not. It's
17 fully briefed. I got a reply. I got a surreply. You knew all
18 along the statute of limitations was a serious issue. It's the
19 number one issue they flagged. And I'm likely to -- I have to
20 say, I think it's an extremely strong statute of limitations
21 argument.

22 Now, if he files it again, it starts it all over
23 again. So it wouldn't be on the merits. I do have some
24 concerns, and so I thought what we would focus on is, do you
25 have any cases that support the fact that if you ask sort of

1 the guy on the street to come take a picture and -- you know,
2 it happens every day of the week. You know, you can be at the,
3 you know, Aquarium and it happens.

4 MR. GOREN: The analogy that Mr. Randazza made with
5 the clerks or asking some passerby to be the photographer,
6 that's not what the allegations of the complaint are. The
7 allegations of the complaint are that the plaintiff,
8 Mr. Monsarrat, he composed the picture. He had the other three
9 subjects -- the young man we believe was a father and his two
10 children -- he posed them, handed his camera with the -- I
11 think it was a 35-millimeter. He did whatever one does to the
12 settings, told the guy or the gal -- we don't know who it
13 was --

14 THE COURT: "Click."

15 MR. GOREN: Yes, but what to include. He composed the
16 picture. It's the same as a selfie except for the really long
17 stick, and the person who clicked is the agent.

18 THE COURT: You know, except I looked at the statute,
19 though. It doesn't say "agent." I do agree he might be an
20 agent, but it says "for hire." You didn't pay the guy, right?

21 MR. GOREN: Your Honor, that's a different thing where
22 a person employs -- in the *Oprah Winfrey* case -- let me touch
23 on that for a second -- it didn't go exactly as far as
24 Mr. Randazza suggests. What had happened was, there were
25 professional photographers who over a seven-year period were

1 taking photos while the TV show was --

2 THE COURT: Right. Yes, I read that.

3 MR. GOREN: Okay. And the invoices weren't clear
4 about who owned it, so when she used the photos in a book
5 several years later, they sued. And to defend it, they first
6 said, "Well, it was a contract for hire. We hired you." The
7 District Court judge said "No." Then she said, "Well, we are
8 joint authors because, you know, we controlled the way the
9 people were standing," and what have you, and the judge said,
10 "No. That had nothing to do with the creativity."

11 Jonathan Monsarrat handed the camera to the passerby,
12 and he created that. No one else did, Judge.

13 THE COURT: Do you have any case on point on that?

14 MR. GOREN: There is no case on point.

15 THE COURT: There is no case. We couldn't find one
16 either.

17 MR. GOREN: There is none.

18 THE COURT: We couldn't find one.

19 MR. GOREN: There is no case.

20 THE COURT: All right, so let me just say this: I'm
21 not doing fair use based on a motion to dismiss. I don't know
22 what I'm going to do on the author one. It's just there's very
23 sparse case law. But I'm pretty sure what I'm going to do on
24 the statute of limitations one, but it's of course without
25 prejudice to refile if you post it again.

1 Let me ask you this. Let me ask you the core thing
2 that's going on here. This guy is essentially implying --
3 portraying your client as being a pedophile.

4 MR. GOREN: Yes, and he's in the business --

5 THE COURT: I mean, that's what the issue is here.

6 MR. GOREN: -- and he's developing --

7 THE COURT: Is his a pornographic website?

8 MR. GOREN: No. It's a website that had ads for
9 Fbook.com, and --

10 THE COURT: So it's more of sexual ads?

11 MR. GOREN: Yes. It's a hate site. This
12 EncyclopediaDramatica is called a hate site that's filled
13 with --

14 THE COURT: So let me ask you this: It struck me as I
15 was reading this that this was more of a slander kind of case
16 or a false light case or some such rather than -- I just, I
17 don't know if fair use applies in this context if it's a hate
18 site, but, in any event, I was curious as to why you styled
19 this as copyright.

20 MR. RANDAZZA: May I address that, your Honor?

21 THE COURT: Yes.

22 MR. RANDAZZA: They tried a defamation case about this
23 against I don't know how many defendants -- I think there was
24 about a dozen defendants -- for contributing to this
25 reputation. And I think your Honor may be taking Mr. Goren's

1 characterizations of the site from his briefing more than from
2 the actual exhibit.

3 THE COURT: I haven't gone on the site, I have to
4 admit, but would I be blocked? What kind of site is it?

5 MR. RANDAZZA: If you would turn your attention to
6 Exhibit C of his complaint, I think that you will see that this
7 allegation -- you know, he keeps repeating -- accuses him of
8 being a pedophile. That doesn't make it so.

9 THE COURT: Well, what's a Pedobear?

10 MR. RANDAZZA: Well, we did brief this, your Honor.

11 THE COURT: And what's a Pedobear?

12 MR. RANDAZZA: Pedobear is a -- you guys are in for a
13 treat now, right? When do you see this in Federal Court? But
14 a Pedobear is a cartoon character that came from Japan sometime
15 in the '90s. It had nothing to do with pedophilia. It was
16 something like an advertisement for, I want to say some kind of
17 food. Then, for want of a better word, smart asses on 4chan
18 decided that this --

19 THE COURT: On what?

20 MR. RANDAZZA: 4chan, which is a website where people
21 goof off, okay? They decided that this bear was Pedobear. So
22 anytime somebody exhibited something that appeared to be
23 pedophilic tendencies, or happened to put a check mark of a --
24 a "like" of a --

25 THE COURT: So they're implying that he had pedophilic

1 tendencies.

2 MR. RANDAZZA: Well, your Honor --

3 THE COURT: I get it.

4 MR. RANDAZZA: But so what? This is a copyright case,
5 and fair use --

6 THE COURT: I agree. I'm just simply saying -- I'm
7 foreshadowing the future.

8 MR. RANDAZZA: But I'm saying, in fair use, to respond
9 to what you were saying, fair use doesn't mean that the
10 plaintiff thinks it's fair, doesn't have any requirement that
11 it be nice. In fact, that's the point. Criticism
12 commentary --

13 THE COURT: How about slander?

14 MR. RANDAZZA: Well, if he wants to bring a defamation
15 claim --

16 THE COURT: Defamation, false light.

17 MR. RANDAZZA: -- let him bring a defamation claim.
18 Let him bring a false light claim. He isn't doing that. He's
19 brought a copyright claim.

20 THE COURT: So let me just say this: I'm displeased
21 at the suggestion that this is -- I'm going to issue an opinion
22 in the next day that this is going to be filed. You're going
23 to portray that to your client. I am not addressing either the
24 authorship issue or the fair use issue. I am likely to dismiss
25 this on statute of limitations grounds, but that statute starts

1 again if he puts it up again, and I will hear an injunction
2 hearing immediately. I think that that is a poor use of
3 judicial resources, shall I say. I was pleased when he took it
4 down. I am sorry the case didn't settle, but he's in for some
5 more attorneys' fees.

6 MR. RANDAZZA: He will be so instructed.

7 THE COURT: So I don't think I've permitted discovery,
8 right?

9 MR. RANDAZZA: Not yet, your Honor, no.

10 MR. WOLMAN: We've begun discovery, your Honor.

11 MR. RANDAZZA: I apologize. I misspoke.

12 THE COURT: Well, did you exchange documents and that
13 sort of thing?

14 MR. WOLMAN: There has been some document exchange,
15 and if this case is not dismissed or we don't proceed on our
16 counterclaim, there would be a forthcoming motion to --

17 THE COURT: Was there a counterclaim?

18 MR. WOLMAN: Yes, your Honor.

19 THE COURT: What's the counterclaim?

20 MR. RANDAZZA: It's under Section 512(f) of the DMCA,
21 your Honor, that when he issued a DMCA notice --

22 THE COURT: DMCA is?

23 MR. WOLMAN: Digital Millennium Copyright Act.

24 THE COURT: So this case doesn't go away if I dismiss
25 it?

1 MR. RANDAZZA: It depends, your Honor. If you dismiss
2 it, we are going to seek our fees as the prevailing party. If
3 they are granted, then I would say that our counterclaim
4 becomes irrelevant. If they're not --

5 THE COURT: So at this point, so maybe I should --
6 it's only on statute of limitations grounds, so maybe I should
7 allow full-blown discovery on the counterclaim.

8 MR. RANDAZZA: And then, your Honor, then the fair use
9 monster comes out of the basement anyway.

10 THE COURT: It does. It sure does.

11 MR. RANDAZZA: As does authorship, your Honor.

12 THE COURT: It sure does. I don't even know what DMCA
13 is. We didn't even look at that. There's no motion on that.

14 MR. RANDAZZA: I can give you a quick overview if
15 you'd like.

16 THE COURT: No, thank you. So I'm just trying to
17 figure out. So I cannot at this point -- even if I dismiss it
18 on statute of limitations ground, I should impose a discovery
19 schedule on the core issues because you have a DMCA claim,
20 unless you want to drop it.

21 MR. RANDAZZA: I misspoke, your Honor. We do have a
22 discovery schedule set up.

23 THE COURT: All right, it's already set up.

24 MR. RANDAZZA: Yes. Yes, we did. Sorry. I had a
25 brain freeze there for a moment.

1 THE COURT: Okay. Oh, that's fine. So it will finish
2 up, and then there will be a motion for summary judgment on the
3 DMCA claim.

4 MR. RANDAZZA: Yes, your Honor.

5 THE COURT: And if in fact he refiles, then I guess
6 the issue would be, it would be a related action to that.

7 MR. RANDAZZA: Yes, your Honor.

8 THE COURT: And reposts it, in other words.

9 MR. GOREN: Struggling to shorten the strokes on this
10 case, query if the counterclaim to the original complaint which
11 has been superseded survives, and if the amended complaint is
12 dismissed, there is nothing before the Court.

13 THE COURT: I don't know. That's a good procedural
14 question for some Federal Court case. I don't know.

15 MR. WOLMAN: And, your Honor, we could easily bring
16 you a case later today that, no, you can't just moot a
17 counterclaim by filing an amended complaint.

18 THE COURT: Well, in any event, I wouldn't play that
19 game. If worst comes to worst, he files a new action and it
20 comes here. I mean, I'm not here to just build up attorneys'
21 fees. Or I could allow you to file a counterclaim immediately
22 to the First Amended Complaint, and so by the time I write the
23 opinion, it comes back. I am not here to build up attorneys'
24 fees. I am here to make this case go away because you have a
25 decent statute of limitations issue, but I find it deeply

1 troubling that someone can just post up on an inter-site
2 accusing someone of being a pedophile, and that he's planning
3 on doing it the second I dismiss the complaint, that he pulled
4 it down and then puts it right back up again.

5 MR. RANDAZZA: Your Honor, I am not telling you he
6 plans on doing it. I'm telling you he wishes to. He believes
7 he has that right. Had he gotten -- you know, if he got a
8 ruling on fair use, he would know he had that right. I know
9 you're not --

10 THE COURT: Who does this? It's just so harsh.

11 MR. RANDAZZA: Well, your Honor, that's like asking
12 who writes Wikipedia.

13 THE COURT: No, it isn't. No, it isn't. Wikipedia is
14 not accusing people of being a Pedobear.

15 MR. RANDAZZA: It depends on the page, your Honor.
16 There have been defamation suits over Wikipedia entries as
17 well. EncyclopediaDramatica --

18 THE COURT: And what do they do? Just now -- I'm just
19 reading today's paper -- they're pulling down all these
20 terrorist things. I mean, at some level there's a level of
21 responsibility.

22 MR. RANDAZZA: Yes, your Honor, and if he has that --
23 if this page said anywhere on it --

24 THE COURT: Excuse me. Pedobear, how do you interpret
25 that?

1 MR. RANDAZZA: Your Honor, to try to take an adult
2 through the world of Pedobear and Internet means would take
3 some time.

4 THE COURT: Yes, and it won't be done on a motion to
5 dismiss, and it will cost your client money, so --

6 MR. RANDAZZA: But what I can say, your Honor --

7 THE COURT: Yes.

8 MR. RANDAZZA: -- is that if you look at the site, if
9 you look at this page, this page is discussing what a creep the
10 guy is. Yes, it is all about what a creep this guy is,
11 compiled by various sources, like any Wikipedia-type page.

12 THE COURT: Well, has he ever been convicted of a
13 child assault?

14 MR. RANDAZZA: To the best of my knowledge, he was
15 only arrested for providing, like, teenage girls with alcohol,
16 not for sexual assault.

17 THE COURT: Thank you.

18 MR. RANDAZZA: He was --

19 THE COURT: So if he's never been convicted of it and
20 never been arrested for it and never -- I just think it's --
21 unless there's some solid evidence that would support it, it is
22 the classic slander case.

23 MR. RANDAZZA: Well, your Honor, if the page said what
24 he says it says. It doesn't say it. What we have is a picture
25 of a bear that you've got to know --

1 THE COURT: I think we're going round and round, so --

2 MR. GOREN: Just quickly, your Honor?

3 THE COURT: Yes.

4 MR. GOREN: Mr. Zaiger or his system administrator, I
5 think the same day he engaged Mr. Randazza, emailed the
6 plaintiff: "We have removed the article, protected the page so
7 that no user can recreate it. Additionally, you have both
8 Mr. Zaiger's assurance and mine it will not be recreated."
9 Your Honor --

10 THE COURT: Oh, that's interesting. So that's
11 judicial estoppel.

12 MR. RANDAZZA: Well, this is settlement discussions.

13 THE COURT: What?

14 MR. RANDAZZA: These are settlement discussions.

15 THE COURT: I think you represented -- I'd have to go
16 back through the transcript -- something like that when we were
17 in court. It was something like that because I thought that
18 the injunction wasn't needed and --

19 MR. RANDAZZA: Your Honor, that is what he said.

20 THE COURT: Excuse me, excuse me. Did you represent
21 that to me in court?

22 MR. RANDAZZA: No. Mr. Goren represented that to you.
23 I actually wished to have his injunctive relief request dealt
24 with, bizarrely, as the defendant. He said it wasn't
25 necessary. I --

1 THE COURT: I can't remember. If it was read to the
2 Court and it was the basis for my court --

3 MR. GOREN: There is a transcript, your Honor.

4 THE COURT: Why don't you order it.

5 MR. GOREN: I did.

6 THE COURT: -- you're bound by the doctrine of
7 judicial estoppel. It's on the transcript? I'll go look for
8 it.

9 MR. RANDAZZA: Yes, your Honor, and I would agree to
10 that, but I did not represent that to your Honor.

11 THE COURT: If it was read to the Court and you didn't
12 object, I would view that as bound by the doctrine of judicial
13 estoppel. But I don't remember it, candidly. I'll have to go
14 back into that transcript.

15 MR. GOREN: Nor do I, your Honor.

16 THE COURT: What?

17 MR. GOREN: I don't recall specifically --

18 THE COURT: I don't recall. I just don't recall.
19 We'll have to all look at it. But, in any event --

20 MR. GOREN: But this is an enormous waste of time, and
21 it is predicated entirely on seeking attorneys' fees claiming
22 fair use. Mr. Zaiger -- just give me 20 seconds on my
23 soapbox -- Mr. Zaiger copied what somebody, an anonymous person
24 had done previously, and then he added a caption to the
25 Pedobear thing: "John Monsarrat reveals his true self."

1 Mr. Zaiger did that, and the reason I believe he did that is
2 that he was trying to get advertisements for porn sites. And I
3 believe that this porn site which showed images of very
4 young-looking girls performing --

5 THE COURT: Well, you're going to have a chance to do
6 discovery into just that because I -- if you've done any
7 discovery, you'd better get going because I saw discovery is
8 soon to end, so you'd better get going. You don't have that
9 much time left, maybe a month or something like that, so you'd
10 better get in gear, or you can settle this. Do you want to go
11 to a mediator?

12 MR. GOREN: Yes.

13 THE COURT: Do you?

14 MR. RANDAZZA: We'd be willing to entertain it, your
15 Honor, but I don't think that -- I don't think that there's any
16 motion on their part. You know, we'll have to talk outside
17 to --

18 THE COURT: Why don't you talk outside. Meanwhile, do
19 you want me to try and get you a magistrate judge?

20 MR. RANDAZZA: Sure, your Honor. Yes, please.

21 THE COURT: ASAP.

22 THE CLERK: ASAP. Okay, I'll do an order of
23 reference.

24 THE COURT: And if you think it's hopeless, then
25 cancel it.

1 MR. RANDAZZA: Thank you, your Honor.

2 MR. GOREN: Thank you, your Honor.

3 THE COURT: Thank you.

4 THE CLERK: All rise.

5 (Adjourned, 10:57 a.m.)

6 C E R T I F I C A T E

7

8

9 UNITED STATES DISTRICT COURT)
DISTRICT OF MASSACHUSETTS) ss.
10 CITY OF BOSTON)

11

12

13 I, Lee A. Marzilli, Official Federal Court Reporter,
do hereby certify that the foregoing transcript, Pages 1
14 through 29 inclusive, was recorded by me stenographically at
15 the time and place aforesaid in Civil Action No. 17-10356-PBS,
16 Jonathan Monsarrat v. Brian Zaiger, and thereafter by me
17 reduced to typewriting and is a true and accurate record of the
18 proceedings.

19

Dated this 11th day of December, 2017.

20

21

22

23

24

/s/ Lee A. Marzilli

25

LEE A. MARZILLI, CRR
OFFICIAL COURT REPORTER